NOS. 05-35780, 05-35774

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY, ET AL.,
Plaintiffs/Appellees,

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, ET AL.
Plaintiff Intervenors/Appellees,

LIBERTARIAN PARTY OF WASHINGTON STATE, ET AL.
Plaintiff Intervenors/Appellees

v.

STATE OF WASHINGTON, ET AL,
Defendants/Appellants,

WASHINGTON STATE GRANGE,
Defendant Intervenors/Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
THE HONORABLE THOMAS S. ZILLY

SUPPLEMENTAL BRIEF OF PLAINTIFF INTERVENORS/APPELLEE WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE

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I. BACKGROUND

On May 19, 2005, the Washington State Republican Party, later joined by the Democratic and the Libertarian parties, sued Washington State election officials challenging the constitutionality of Initiative 872 ("I-872") on facial and as applied grounds and moving for preliminary injunctive relief. The defendant election officials told the District Court that they needed to know by July 15, 2005 whether I-872 would be implemented for the 2005 elections. Grange Motion for Expedited Review at 4. Thereafter, Judge Zilly requested the political parties first file a motion for summary judgment attacking I-872 on facial grounds and addressing a stipulated set of questions in that regard. Order of July 15, 2005 ("Order") at 13 n.13 [ER 548]. Judge Zilly reserved all other issues. *Id.*

On July 29, 2005, the United States District Court for the Western District of Washington enjoined the State of Washington ("the State") and its political subdivisions from implementing or conducting any election pursuant to the provisions of I- 872. Permanent Injunction ¶ 1 [ER 576-77]. Judge Zilly additionally enjoined the State and its political subdivisions from enforcing or implementing I-872's filing statute as part of any primary or general election. *Id.* at ¶ 2. Judge Zilly's two injunctions were based upon his Order in which he concluded that the filing statute proposed by I-872 forced associations on political parties whether or not the primary created by I-872 nominated party candidates for the general election ballot. Order at 28-30 [ER 563-65]. Because he held I-872 facially invalid, Judge Zilly did not reach a number of additional issues raised in

the case. *See* Order at 13 n.13 [ER 548] and Supplemental Order of August 12, 2005 at ¶¶ 1, 2 [ER 587].

The State and Grange appealed Judge Zilly's Order. On August 22, 2006, this Court unanimously affirmed the decision of the District Court. This Court determined that a candidate's expression of a party preference on the ballot "forces the parties to be associated with self-identified candidates not of the parties' choosing. This constitutes a severe burden upon the parties." *Wash. State Rep. Party v. Washington*, 460 F.3d 1108, 1119 (9th Cir. 2006). The Court further concluded that neither the State nor the Grange had demonstrated that I-872 was narrowly tailored to advance a compelling State interest and therefore struck it down as unconstitutional. The Court did "not reach" other arguments made by the political parties with respect to I-872. *Id.* at 1124 n.28. The Court did not discuss the extent of associations forced upon the political parties by the interaction of I-872's filing statute and other Washington election statutes that impose requirements relating to advertising, financing, disclosure and voter's pamphlets.

The State and the Grange sought certiorari from the Supreme Court. Certiorari was granted. 127 S.Ct. 1373 (2007). The Supreme Court issued a mandate to this Court on April 21, 2008, reversing this Court based on an opinion dated March 18, 2008. The State then sought an order from this Court allowing it to rescind its settlement with the political parties of fee claims through August 22, 2006. The State contended that "[t]he decision of the United States Supreme Court makes clear that, whatever may happen in the future, the claims the political parties made in this Court will avail them of nothing." State Reply in Supp. of Mot. to

Vacate Fees at 5, 6. The State asserted that there were no more issues to be considered by this Court in light of the Supreme Court opinion and—despite FRCP 62(a)—that "it cannot be seriously suggested that the [District Court's] injunction remains in place. *Id.* at 6 n.5.

On July 3, 2008, this Court ordered the State, the Grange and the political party plaintiffs to submit briefs addressing the impact of the Supreme Court decision on issues raised in the State and Grange appeals from the District Court, but not resolved by this Court's August 22, 2006 opinion.

II. IMPACT OF SUPREME COURT DECISION ON THE STATE AND GRANGE APPEAL OF THE DISTRICT COURT'S DECISION

The Supreme Court's decision addresses only the facial validity of I-872 as it relates to the general election ballot.[1] The Supreme Court summarized the holding of this Court as:

> [The Court of Appeals] held that the I-872 primary severely burdens the political parties associational rights because the party-preference designation on the ballot creates a risk that primary winners will be perceived as the parties' nominees and produce an "impression of association" between a candidate and his party of preference even when the party does not associate with, or wish to be associated with, the candidate.

Wash. State Grange v. Wash. State Republican Party, 128 S.Ct. 1184, 1190 (2008). The Supreme Court reversed this judgment of the Ninth Circuit "[b]ecause I-872 does not on its face impose a severe burden on political parties' associational rights." *Id.* at 1187. The Supreme Court reasoned that I-872 could not be deter-

[1] The Supreme Court granted certiorari only to determine "whether I-872, on its face, violates the political parties' associational rights." *Wash. State Grange v. Wash. State Republican Party*, 128 S.Ct. 1184, 1190 (2008).

mined to be facially invalid because the form of ballot was not directly specified by the I-872 and the State had not finalized a ballot format. *Id.*[2]

The Supreme Court left untouched this Court's conclusion that if the State forces a political party to accept an association created by a candidate's unilateral statement it severely burdens associational rights. *Wash. State Rep. Party*, 460 F.3d at 1121. The Supreme Court reversed only a conclusion that I-872 in every conceivable implementation would, without more, force associations onto political parties on the general election ballot. *Wash. State Grange*, 128 S.Ct. at 1193-94.

The Supreme Court left to the Court of Appeals the decision whether the District Court's injunction should be affirmed on grounds other than the one ground the Supreme Court reviewed. Other grounds raised by this appeal include (1) whether forced association is produced as a result of the interaction between I-872's filing statute and other election statutes, such as party name protection and the campaign advertising statutes that were not repealed by I-872[3]; (2) trademark issues; and (3) ballot access concerns. Additionally, since the State had repealed its proposed implementation of I-872, the Supreme Court did not review the Ninth

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[2] The State repealed the regulations implementing I-872 that it had presented to the District Court. The Supreme Court concluded that "because I-872 has never been implemented we do not even have ballots indicating how party preference will be displayed," and "It stands to reason that whether voters will be confused by the party-preference designations will depend in significant part on the form of the ballot." *Wash. State Grange*, 128 S.Ct. at 1194.

[3] The State separately identified the constitutionality of the filing statute as one of the issues before this Court in its opening Brief: "Does Washington's filing statute impose forced association of political parties with candidates in violation of the parties' First Amendment associational rights?" State Opening Brief at 3 (Issue 4). The Democratic Party's Response Brief argued that I-872's filing statute forced associations beyond an association on the ballot. Dem. Response to the State at 18.

Circuit or the District Court's conclusions that as proposed in 2005 the State's implementation of I-872 is unconstitutional.

III. IMPLEMENTATION OF I-872 SUBSEQUENT TO THE SUPREME COURT'S DECISION AND PRIOR TO FINAL APPELLATE REVIEW OF THE DISTRICT COURT'S INJUNCTION

Immediately after learning of the Supreme Court's decision, the Secretary of State vowed to implement I-872 in 2008. *See Reed Vows to have Top-Two Ballot in Place for August Primary*, YAKIMA HERALD REPUBLIC (Mar. 18, 2008) *available at* http://www.yakima-herald.com/stories/2449. The State ignored the District Court's injunction and proceeded to implement I-872 and its filing statute.[4] The State adopted for use in filing a new declaration of candidacy on which a candidate for partisan office could write-in a political party preference that would thereafter be printed with the candidate's name on the primary and general election ballots and also in voter's guides, on sample ballots and, by virtue of the state's advertising statute, RCW 42.17.510(1), be required to be printed in all advertising supporting or opposing the candidate. The State's Public Disclosure Commission ("PDC"), which regulates campaign activities and financing, adopted a regulation equating the "party preference" given by a candidate on his or her declaration of candidacy and "Party Affiliation." *See* Addendum "b" (New WAC 390-05-274). The PDC enforces RCW 42.17.040(2)(f) which requires that every political committee in the state file a public statement with the PDC that includes the "party

[4] The State issued draft regulations implementing I-872 on April 16, 2008—before the Supreme Court mandate to this Court had even issued. *See* Rule Making Order's reasons for finding an "emergency" exists. *See* Addendum "a". It did not request that any court modify or vacate the District Court's injunction.

affiliation" of each candidate the campaign is supporting. By virtue of New WAC 390-05-274, when the public looks to official records to determine the party affiliation of the candidate, it will be told by the State that a candidate's unilateral statement of party preference indicates his or her party affiliation.

Compounding the forced association, Washington election law mandates that all advertising for or against a candidate clearly identify the party preference that the candidate gave in his or her declaration of candidacy. RCW 42.17.510(1). In July 2008, the PDC began distributing flyers advising candidates, interested political committees, and independent spenders that the requirement to identify a candidate's party preferences could be met by using specific abbreviations for each party. *See* "Abbreviations," PDC Political Advertising Flyer (July 2008), *available at* http://www.pdc.wa.gov/archive/guide/brochures/pdf/2008/2008.Bro.Adv.pdf. These abbreviations are *exactly* the same abbreviations that the PDC previously determined clearly identified political party affiliation: "The following abbreviations may be used in advertising. PDC believes they *clearly identify political party affiliation.*" "Political Advertising" Guide, PDC (Dec. 2004) (emphasis added) [ER 224]. The State tells candidates and others that they may unilaterally appropriate party logos and symbols to identify their party "preference": "Official symbols or logos adopted by the state committee of the party may be used in lieu of other identification." *See* July 2008 PDC Flyer, *supra.* The State does not require the candidate or the advertiser to obtain party permission before making use of the party affiliation-identifying official logos, symbols, or abbreviations.

Continuing the forced association, candidates who file stating a preference for a party are then identified by the State as that Party's candidates: Summarizing the 2008 August primary party filings, the PDC classified the candidates, not by preference, but as "Major Party Candidates" of Democratic and Republican parties:

PARTY BREAKDOWN	
Major Party Candidates:	
Democratic Party	207
Republican Party	244
Minor Party Candidates:	
Constitution Party	3
Green Party	3
Libertarian Party	1
Progressive Party	1
Independent Candidates	13
No Party Preference	20
Other Party Preference	9
	501

See PDC Memorandum by Vickie Rippie, Executive Director (June 17, 2008) (full reproduction in Addendum "c").

The State does not allow political parties to object to the use by candidates of their names, symbols and logos. *See Top 2 Primary: FAQs for Candidates*, "Can the political parties prevent a candidate from expressing a preference for their party? No. ...", WASH. SEC. OF STATE WEBSITE *at* http://www.secstate.wa.gov/elections/faqcandidates.aspx (last viewed July 27, 2008).

IV. SUPPLEMENTAL DISCUSSION OF TRADEMARK ISSUES, PROTECTION OF PARTY NAMES, AND FORCED ASSOCIATION

The right of a political party to protect the use of its name is well recognized. The protections of the Lanham Act (15 U.S.C. §1051, *et seq.*) extend to the use of names and symbols of political organizations. *United We Stand America, Inc. v. United We Stand America New York, Inc.*, 128 F.3d 86, 90 (2nd

Cir. 1997); *American Family Life Ins. Co. v. Hagan*, 266 F. Supp. 2d 682, 694 (N.D. Ohio 2002); *Tomei v. Finely*, 512 F. Supp. 695 (N.D. Ill. 1981).[5] Political parties need not have registered their marks to enjoy the benefits of such protection. *See Partido Revolucionario Dominicano (PRD) Seccional Metropolitania de Washington-DC, Maryland y Virginia v. Partido Revolucionario Dominicano, Seccional de Maryland y Virginia*, 312 F. Supp. 2d 1, 11 (D.D.C. 2004) (along with common law trademark claims, the Lanham Act's protection of unfair competition extends even to an owner of an unregistered mark). When a potential for confusion exists with respect to political organizations, there arises "an additional, unique harm" that goes beyond traditional trademark injury. *Partido Revolucionario Dominicano*, 312 F. Supp. 2d at 16.

> A political organization that ... endorses candidates under a trade name performs the valuable service of communicating to voters that it has determined that the election of those candidates would be beneficial to the objectives of the organization.... If different organizations were permitted to employ the same trade name in endorsing candidates, voters would be unable to derive any significance from an endorsement, as they would not know whether the endorsement came from the organization whose objectives they shared or from another organization using the same name. ... Any group trading in political ideas would be free to distribute [campaign materials] in the name of the "Republican Party," the "Democratic

[5] The Grange argued that political parties are not entitled to invoke the Lanham Act to protect misappropriation of their names because the parties are not "using the ballot in connection with the sale of goods." *See* Grange Opening Br. at 21 n.11 and 22, citing *Tax Cap Committee v. Save Our Everglades, Inc.*, 933 F. Supp. 1077, 1081 (S.D. Fla. 1996) ("circulating petitions did not qualify as a use in commerce"). The Second Circuit considered and flatly rejected *Tax Cap's* conclusion in *United We Stand*, noting that the "suggestion that the performance of such functions is not within the scope of 'services in commerce' seem to us to be not only wrong but extraordinarily impractical for the functioning of our political system." 128 F.3d at 90 and 91 n.2 ("respectfully" disagreeing with *Tax Cap*).

> Party," or any other. *The resulting confusion would be catastrophic;* ....

United We Stand, 128 F.3d at 90 (emphasis added). If widely-recognized party symbols and logos are appropriated in addition to party names, the confusion can only be worse.

Even in the absence of trademark protection, Washington State election law evidences a broad public policy that candidates be authorized by a party in order to campaign using the party's name. RCW 29A.52.116 requires that major party candidates for partisan office be nominated by the party in a public primary. I-872 did not repeal RCW 29A.52.116, and the District Court determined that it was not inconsistent with I-872. Order at 19 n.15 [ER 554].

The State suggests that RCW 29A.52.116 was impliedly repealed by I-872. However, I-872's evident purpose has nothing to do with how political parties nominate their candidates. I-872 specifies how many candidates advance from the primary to the general and who votes on their advancement. Even if the doctrine of implied repeal were applied to RCW 29A.52.116, it would only lead to implied repeal of the statute to the extent *inconsistent* with I-872.[6] RCW 29A.52.116 is perhaps contradictory to I-872 in specifying not only that nomination by parties must occur but additionally that it must be done by public primary. But nothing prohibits a legislature from having two primaries in the same year for the same

[6] Implied repeal is strongly disfavored in Washington law. *State v. Lessley*, 827 P.2d 996, 1000 (Wash. 1992). Moreover, Washington's Supreme Court has recently confirmed the state constitutional requirement that voters and legislators be fully apprised of the exact manner in which statutes are being amended. *Washington Citizens Action of Wash. v. State*, 171 P.3d 486 (Wash. 2007). I-872 cannot, in drive-by fashion, impliedly repeal RCW 29A.52.116.

office, as opposed to having party candidates nominated by convention and then competing in a public winnowing primary for advancement to the general election.[7] In any event, I-872 plainly is not contradictory in requiring that major party candidates be nominated by their parties. "Political parties may nominate candidates by whatever mechanism they choose." Secretary of State's Emergency Regulations implementing Top Two Primary at WAC 434-230-055(4) (Addendum "a"). I-872 is not so inconsistent with RCW 29A.52.116 that it cannot be reconciled with it and it does not completely cover the subject matter of nomination by parties nor evidently intend to supersede statutes requiring candidates to be nominated by their parties. Washington's doctrine of implied repeal would not support a finding that RCW 29A.52.116 is wholly repealed by implication by I-872.

Washington also gives minor political parties statutory rights to limit the use of their names by candidates. RCW 29A.20.121 requires that minor party candidates be nominated through party conventions. RCW 29A.20.161 sets forth the legal requirements for a certificate evidencing a candidate's nomination by a minor party. RCW 29A.20.171 establishes a summary court procedure for adjudicating disputes between multiple candidates claiming to be nominated by the same minor party. None of these statutes is inconsistent with I-872.

I-872 is only inconsistent with prior statutes relating to minor parties in the portion of prior law that allowed minor party nominees to proceed *directly* to the

[7] The State of Louisiana, for example, has two sequential primaries preceding its general election, one on September 6, 2008 and one on October 4, 2008. http://www.sos.louisiana.gov/tabid/68/Default.aspx

general election by virtue of nomination convention. After I-872, those candidates must appear on the primary ballot and compete for the right to go forward. To the extent that the District Court concluded that a broader implied repeal of minor party statutes was effectuated by I-872, the District Court erred. Implied repeal must be used sparingly and should not extend beyond direct contradiction.[8] The minor and major party statutes requiring that candidates first be nominated by political parties before using the name of the political party remain valid.

V. CONCLUSION

Whether or not I-872 could have been implemented in such a fashion as to avoid forcing associations on political parties, the State has failed to do so. It should not be allowed to invade political party rights of association with its hasty, flawed implementation in violation of the District Court's injunction. Complying with the substance of the injunction in connection with this primary would not be burdensome for the State. The same ballots may readily be counted according to the rules set specified by RCW 29A.52.151(1) and advancement to the general be limited to the candidate of each "party preference" that has the most votes.

This Court should affirm the District Court's decision that I-872 is unconstitutional. If this Court determines that further proceedings are necessary in

[8] The State asserts that the major political parties argue against implied repeal of minor party statutes only to create a potential equal protection argument. To the contrary, all of the political parties in this case share a common desire to protect their members from misleading, deceptive and false associational use of their names. The equal protection argument that the State fears arises if minor parties but not major parties are allowed to nominate their candidates and protect the use of their names. If implied repeal is not used to deprive both major and minor parties of their statutory rights to protect the use of their names the State has no reason to fear equal protection arguments.

the District Court and that a permanent injunction is inappropriate, the District Court's injunction should not be vacated *in toto* but instead should be modified to a preliminary injunction pending trial.

DATED this first day of August, 2008.

Respectfully submitted,

K&L GATES LLP

By _____

David T. McDonald, WSBA #5260
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Attorneys for Plaintiff
Intervenors/Appellees Washington State
Democratic Central Committee, *et al.*

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

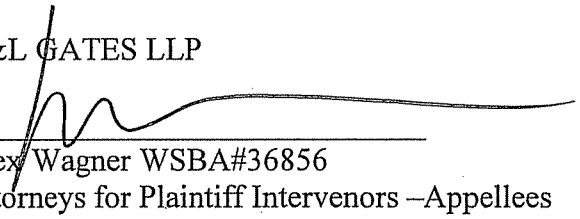
1. This brief complies with the format requirements of Fed. R. App. P. 32 and Ninth Circuit Rule 32-3(1) as a monospaced brief of the designated number of pages (15) pursuant to Order of this Court.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Windows in 14 point font size and Times New Roman type style.

DATED: August 1, 2008.

Respectfully submitted,

K&L GATES LLP



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Washington State Democratic Central Committee, *et al.*

ADDENDUM

a. **Rule Making Order and New WAC 434-230-055(4)**

b. **New WAC 390-05-274**

c. **PDC Memorandum by Vickie Rippie (June 17, 2008)**

a

RULE-MAKING ORDER

CR-103 (June 2004)
(Implements RCW 34.05.360)

Agency: Office of the Secretary of State, Elections Division

☐ **Permanent Rule**
☒ **Emergency Rule**

Effective date of rule:
Permanent Rules
☐ 31 days after filing.
☐ Other (specify) _____ **(If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)**

Effective date of rule:
Emergency Rules
☒ Immediately upon filing.
☐ Later (specify) _____

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?
☐ Yes ☐ No If Yes, explain:

Purpose:
The purpose of this rule is to implement Initiative 872 for the 2008 Primary and General Elections.

Citation of existing rules affected by this order:
Repealed: 434-220-010, 434-220-020, 434-220-030, 434-220-040, 434-220-050, 434-220-060, 434-220-070, 434-220-080, 434-220-090, 434-230-020, 434-230-040, 434-230-050, 434-230-080, 434-230-150, 434-230-160, 434-230-170, 434-230-190, 434-230-200, 434-230-210, 434-230-220,
Amended: 434-208-060, 434-215-025, 434-230-010, 434-230-060, 434-250-040, 434-250-050, 434-250-310, 434-253-020, 434-253-025, 434-262-031, 434-262-160, 434-335-040, 434-335-445, 434-381-120.
Suspended:

Statutory authority for adoption: RCW 29A.04.611

Other authority :

PERMANENT RULE ONLY (Including Expedited Rule Making)
Adopted under notice filed as WSR _____ on _____ (date).
Describe any changes other than editing from proposed to adopted version:
If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:
Name: phone ( ) _____
Address: fax ( ) _____
e-mail _____

EMERGENCY RULE ONLY
Under RCW 34.05.350 the agency for good cause finds:
☒ That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
☐ That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this finding:

On March 18, 2008, the United States Supreme Court issued *Washington State Grange v. Washington State Republican Party, et al.* 552 U.S. __, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). In this opinion, the Court reversed a Ninth Circuit opinion that had declared Washington's Top Two Primary system unconstitutional. The impact of this ruling is that the primary system enacted by Initiative 872 (Chapter 2, Laws of 2005) is now in effect. This change in primary election systems necessitates changes in the administrative rules relating to filing for office, the format of ballots and ballot materials, information submitted for appearance in the state voters' pamphlet, and the administration of primary and general elections. Pursuant to RCW 29A.24.081, the Secretary of State's Office and county auditors may begin to accept declarations of candidacy beginning May 16, 2008. The regular candidate filing period ends June 6, 2008. Ballots will be formatted and sent to print in June. There is insufficient time to adopt these rules through the standard rulemaking process. The Secretary of State's Office did send a draft of the proposed rules to stakeholders and interested parties on April 16, 2008, posted the draft rules on the agency's website, and accepted public comment through April 22, 2008.

Date adopted: May 2, 2008

NAME (TYPE OR PRINT) Steve Excell

SIGNATURE

TITLE Assistant Secretary of State

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: May 02, 2008
TIME: 12:20 PM

WSR 08-10-055

(COMPLETE REVERSE SIDE)

NEW SECTION

WAC 434-230-055 Partisan primary. In a primary for partisan congressional, state or county office conducted pursuant to chapter 2, Laws of 2005 (Initiative 872):

(1) Voters are not required to affiliate with a political party in order to vote in the primary election. For each office, voters may vote for any candidate in the race.

(2) Candidates are not required to obtain the approval of a political party in order to file a declaration of candidacy and appear on the primary or general election ballot as a candidate for partisan office. Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate. A candidate's political party preference is not used to determine which candidates advance to the general election.

(3) Based on the results of the primary, the two candidates for each office who receive the most votes and who receive at least one percent of the total votes cast for that office advance to the general election. The primary election does not serve to nominate any political party's candidates, but serves to winnow the number of candidates down to a final list of two for the general election. Voters in the primary are casting votes for candidates, not choosing a political party's nominees. RCW 29A.36.191 does not apply since the predecessor statute, RCW 29A.36.190, was repealed in chapter 2, Laws of 2005.

(4) Chapter 2, Laws of 2005 repealed the prior law governing party nominations. Political parties may nominate candidates by whatever mechanism they choose. The primary election plays no role in political party nominations, and political party nominations are not displayed on the ballot.

(5) If dates, deadlines, and time periods referenced in chapter 2, Laws of 2005, conflict with subsequently enacted law, such as chapter 344, Laws of 2006, the subsequently enacted law is effective.

AMENDATORY SECTION (Amending WSR 07-24-044, filed 11/30/07, effective 12/31/07)

WAC 434-230-060 Primary votes required for appearance on general election ballot. Following any ((~~nonpartisan~~)) primary, ((~~no~~)) a candidate's name shall be entitled to appear on the general election ballot ((~~unless~~)) if he or she receives the greatest or the next greatest number of votes for the office and additionally receives at least one percent of the total votes cast for the office.

((~~Following any partisan primary, no major political party~~

b

NEW SECTION

WAC 390-05-274 Party affiliation--Party preference. (1) "Party affiliation" as that term is used in chapter 42.17 RCW and Title 390 WAC means the candidate's party preference as expressed on his or her declaration of candidacy. A candidate's preference does not imply that the candidate is nominated or endorsed by that party, or that the party approves of or associates with that candidate.

(2) A reference to "political party affiliation," "political party," or "party" on disclosure forms adopted by the commission and in Title 390 WAC refers to the candidate's self-identified party preference.

c

STATE OF WASHINGTON
PUBLIC DISCLOSURE COMMISSION
*711 Capitol Way Rm 206, PO Box 40908 * Olympia, Washington 98504-0908 * (360) 753-1111 * Fax (360) 753-1112*
*Toll Free 1-877-601-2828 * E-mail: pdc@pdc.wa.gov * Website: www.pdc.wa.gov*

TO: Members, Public Disclosure Commission

FROM: Vicki Rippie, Executive Director

DATE: June 17, 2008

SUBJECT: Initiative 872 (Top Two Primary) and its impact on implementation of campaign finance law provisions in 2008 – Continued

Background

As was discussed in some detail last month, earlier this year the U.S. Supreme Court upheld Washington's Top Two Primary system which was enacted into law by the voters in 2004 through the passage of I-872. 2008 is the first year the Top Two system is being implemented by elections officials. Since the Supreme Court's decision was not issued until March, the Legislature has not had an opportunity to respond to the Top Two decision to address any impacted laws, including the portion of the district court decision concluding that I-872 "impliedly repealed" chapter 29A.20 RCW relating to Minor Party and Independent Candidate Nominations. The definition of "bona fide political party" in the campaign finance statute relies on the process in RCW 29A.20 to distinguish bona fide political parties from other political committees for contribution limit purposes.

At your May meeting, staff identified three I-872 related campaign finance issues for discussion and possible action in an effort to provide interim guidance for the 2008 elections: Party Preference, Party Identification, and Bona Fide Political Parties.

Summary of Issues and Possible Next Steps

1. **Party Preference.** According to election law and rules, primaries in Washington are now runoff elections, not nominating elections.[1] For partisan office, a candidate's party designation on the declaration of candidacy form indicates the candidate's party preference only, and does not indicate a formal affiliation between the candidate and the party specified, or reflect an endorsement or support from that party.

   Two sections of Chapter 42.17 RCW and Title 390 WAC use the term "party affiliation" as opposed to "party preference."[2]

[1] According to RCW 42.17.020(39), "'Primary' for the purposes of RCW 42.17.640 [the per-election contribution limits] means the procedure for nominating a candidate to state office under chapter 29A.52 RCW or any other primary for an election that uses, in large measure, the procedures established in chapter 29A.52 RCW." The Top Two Primary uses the procedures established in RCW 29A.52.112. Nevertheless, the Legislature may consider amending section .020(39) in 2009.

[2] RCW 42.17.040, Statement of organization by political committees; RCW 42.17.093, Out-of-state political committees—Reports; WAC 390-17-030, Sample ballots and slate cards; and WAC 390-18-020, Advertising—Political party identification.

Recommendation: Staff recommends adoption of an emergency rule clarifying the term "party affiliation" and references to "party," "political party" and similar terms on disclosure forms and elsewhere in Title 390 WAC. See draft WAC 390-05-274 attached.

2. **Party Identification.** According to RCW 42.17.510(1), if a candidate for partisan office has expressed a party or independent preference on the declaration of candidacy, that party or independent designation shall be clearly identified in electioneering communications, independent expenditures, or political advertising.

   Given the recent I-872 court decision, the text of I-872, and the Secretary of State rules implementing the Top Two Primary, in 2008 at least, there is no finite list of minor parties. Candidates are free to select any name to identify their preferred party so long as the name does not exceed 16 characters and is not obscene.

   Because of the uncertainty surrounding party preference selections, the fact that party identification no longer indicates party endorsement or support, and that the agency's resources will be stretched thin during an always challenging statewide election year, staff recommended the Commission temporarily suspend enforcement of RCW 42.17.510(1) with respect to party preference identification until the Legislature had an opportunity to revisit this issue. Although the Commission initially concurred in this approach at the May meeting, ultimately at that meeting you decided it was more prudent to allow additional time for public comment before making a final decision.

   Attached are comments from State Senator Darlene Fairley and attorney Richard L. Pope, Jr. Both oppose the May staff recommendation, for good reason: I-872 was passed by the voters in 2004. In 2005, as part of ESSB 5034 – a PDC request bill relating to electioneering communications – the Legislature amended RCW 42.17.510(1) adding language about clearly identifying the candidate's party preference in advertising. In other words, fully aware that I-872 had passed, the Legislature adopted language specifically calling for party preferences to appear in advertising. I certainly wish I had had the presence of mind to bring this important fact to your attention last month, and I apologize for not doing so.

   It is also important to recognize, however, that until the district court decision was rendered and not repudiated by the U.S. Supreme Court in March of this year, I do not see how it could have been known, at least with certainty, that RCW 29A.20 had been repealed by I-872. This is the action that removed the statutory mechanism for recognizing, in a given election year, which organizations qualify as minor parties, and which candidates would seek office independent of any party. It is the removal of this process that leads to a potentially infinite list of party preferences that the statute requires be clearly identified in advertising.

   The Commission's decision to postpone further evaluation and action until the June 26 meeting provided staff with an opportunity to review the declarations of candidates for partisan office and find out what party preferences were actually designated. There are seven "non-traditional" party names listed: "America's Third Party," "Executive Excellence Party," "Party of Commons," "Cut Taxes G.O.P. Party," "Progressive Dem. Party," "SalmonYoga Party," and "True Democratic Party."

Senator Fairley observed on page 2 of her letter that candidates selected these party names with a desire to distinguish themselves from other candidates, and it should prove no hardship to list that preference on advertising; in fact, it would be consistent with the candidate's message to list it.

In addition, some of the candidates who prefer the "non-traditional" parties listed above may select mini reporting and, unless they change options consistent with WAC 390-16-125 (Mini campaign reporting—Exceeding limitations), they may raise and spend no more than $5,000 on their respective campaigns, suggesting that minimal advertising may be sponsored by the campaigns.

Revised Recommendation: Based on the public comments received, the Legislature's action in 2005, and the actual party preference designations now known that will be used by candidates, staff recommends the Commission advise that enforcement of RCW 42.17.510(1) is to proceed normally as facts and circumstances warrant.

3. **Bona Fide Political Parties.** As alluded to above and discussed in greater detail last month, the contribution limit provisions approved by voters in 1992 rely on RCW 29A.20 to distinguish bona fide political parties from other political committees. Bona fide parties may contribute considerably more to their candidates than may committees that do not satisfy the definition: $2.6 million as opposed to $1,600 per election to a candidate for statewide office.

Since RCW 29A.20 has been effectively repealed and RCW 42.17 has not been amended by the Legislature to remove reference to RCW 29A.20 and substitute a new definition of a minor party organization, it appears the Commission has two options. You could determine either that:

(a) the law no longer provides a mechanism for an organization to become a minor party, and until the Legislature acts such parties do not technically exist for purposes of party contribution limits; or

(b) I-872's impact on the bona fide political party definition in RCW 42.17 appears to be an unintended consequence and, consistent with the intent of I-134 and the intrinsic value of minor parties to the political process, clarify the definition of "bona fide political party" in rule to include those minor parties which in any year between 2002 and 2007 filed at least one valid certificate of nomination under former RCW 29A.20. Based on updated information from elections officials, this list now includes: the American Heritage Party, Constitution Party, Green Party, Libertarian Party, Progressive Party, Socialist Equality Party, Socialist Workers Party, and Workers World Party.

Recommendation: Staff recommends the Commission select option (b). Attached is a draft emergency rule (WAC 390-05-196) that, if adopted, could go into effect on June 30, 2008, to address this issue for the 2008 election only, pending amendment of RCW 42.17.020(6) by the Legislature. In addition, we recommend that you amend, on an emergency basis, WAC 390-05-275 to reference new WAC 390-05-196.

Emergency Rules

According to RCW 42.17.370(1), any rule relating to campaign finance, political advertising or related forms must be in effect by June 30 of a given year or it cannot go into effect until the day following the general election.

Since the three draft rules attached relate to these topics, in order to be in effect this year they need to be adopted on an emergency basis. If the Commission decides to go forward with rulemaking, the emergency basis for each rule will have to be identified. See RCW 34.05.350(1) below. An emergency rule is effective for 120 days beginning on the date it is filed with the Code Reviser unless a later date is specified in the adoption order.

RCW 34.05.350 Emergency rules and amendments.

(1) If an agency for good cause finds:

(a) That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest; or

(b) That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule,

the agency may dispense with those requirements and adopt, amend, or repeal the rule on an emergency basis. The agency's finding and a concise statement of the reasons for its finding shall be incorporated in the order for adoption of the emergency rule or amendment filed with the office of the code reviser under RCW 34.05.380 and with the rules review committee.

(2) An emergency rule adopted under this section takes effect upon filing with the code reviser, unless a later date is specified in the order of adoption, and may not remain in effect for longer than one hundred twenty days after filing. Identical or substantially similar emergency rules may not be adopted in sequence unless conditions have changed or the agency has filed notice of its intent to adopt the rule as a permanent rule, and is actively undertaking the appropriate procedures to adopt the rule as a permanent rule. This section does not relieve any agency from compliance with any law requiring that its permanent rules be approved by designated persons or bodies before they become effective.

(3) Within seven days after the rule is adopted, any person may petition the governor requesting the immediate repeal of a rule adopted on an emergency basis by any department listed in RCW 43.17.010. Within seven days after submission of the petition, the governor shall either deny the petition in writing, stating his or her reasons for the denial, or order the immediate repeal of the rule. In ruling on the petition, the governor shall consider only whether the conditions in subsection (1) of this section were met such that adoption of the rule on an emergency basis was necessary. If the governor orders the repeal of the emergency rule, any sanction imposed based on that rule is void. This subsection shall not be construed to prohibit adoption of any rule as a permanent rule.

. . .

Please contact me at 360/586-4838 or 1-877-601-2828 if you have questions you would like answered before the June 26 meeting. Thank you.

Attachments: Draft Rules: New WACs 390-05-274 and 390-05-196, and Amended WAC 390-05-275
RCW 42.17.510
Summary of 2008 Declared Candidates
Letter dated June 12, 2008, from Senator Darlene Fairley
Letter dated May 27, 2008, from Richard L. Pope, Jr.

Possible Emergency Rulemaking to Implement I-872's Impact on Campaign Finance Provisions in 2008

June 2008

Party Affiliation Draft Rule

New WAC 390-05-274 Party affiliation, party preference, etc.

(1) "Party affiliation" as that term is used in chapter 42.17 RCW and Title 390 WAC means the candidate's party preference as expressed on his or her declaration of candidacy. A candidate's preference does not imply that the candidate is nominated or endorsed by that party, or that the party approves of or associates with that candidate.

(2) A reference to "political party affiliation," "political party," or "party" on disclosure forms adopted by the commission and in Title 390 WAC refers to the candidate's self-identified party preference.

Bona Fide Political Party Draft Rules

New WAC 390-05-196 Bona fide political party—Application of term. An organization that filed a valid certificate of nomination with the secretary of state or a county elections official under chapter 29A.20 RCW in any year from 2002 through 2007 is deemed to have satisfied the definition of bona fide political party in RCW 42.17.020.

Amend WAC 390-05-275 Definition – Party organization. "Party organization," as that term is used in chapter 42.17 RCW and Title 390 WAC, means a bona fide political party as defined in RCW 42.17.020 and applied in WAC 390-05-196.

RCW 42.17.510
Identification of sponsor — Exemptions.

(1) All written political advertising, whether relating to candidates or ballot propositions, shall include the sponsor's name and address. All radio and television political advertising, whether relating to candidates or ballot propositions, shall include the sponsor's name. The use of an assumed name for the sponsor of electioneering communications, independent expenditures, or political advertising shall be unlawful. **For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, that party or independent designation shall be clearly identified in electioneering communications, independent expenditures, or political advertising.**

(2) In addition to the materials required by subsection (1) of this section, except as specifically addressed in subsections (4) and (5) of this section, all political advertising undertaken as an independent expenditure by a person or entity other than a party organization, and all electioneering communications, must include the following statement as part of the communication "NOTICE TO VOTERS (Required by law): This advertisement is not authorized or approved by any candidate. It is paid for by (name, address, city, state)." If the advertisement undertaken as an independent expenditure or electioneering communication is undertaken by a nonindividual other than a party organization, then the following notation must also be included: "Top Five Contributors," followed by a listing of the names of the five persons or entities making the largest contributions in excess of seven hundred dollars reportable under this chapter during the twelve-month period before the date of the advertisement or communication.

(3) The statements and listings of contributors required by subsections (1) and (2) of this section shall:

(a) Appear on the first page or fold of the written advertisement or communication in at least ten-point type, or in type at least ten percent of the largest size type used in a written advertisement or communication directed at more than one voter, such as a billboard or poster, whichever is larger;

(b) Not be subject to the half-tone or screening process; and

(c) Be set apart from any other printed matter.

(4) In an independent expenditure or electioneering communication transmitted via television or other medium that includes a visual image, the following statement must either be clearly spoken, or appear in print and be visible for at least four seconds, appear in letters greater than four percent of the visual screen height, and have a reasonable color contrast with the background: "No candidate authorized this ad. Paid for by (name, city, state)." If the advertisement or communication is undertaken by a nonindividual other than a party organization, then the following notation must also be included: "Top Five Contributors" followed by a listing of the names of the five persons or entities making the largest contributions in excess of seven hundred dollars

reportable under this chapter during the twelve-month period before the date of the advertisement. Abbreviations may be used to describe contributing entities if the full name of the entity has been clearly spoken previously during the broadcast advertisement.

(5) The following statement shall be clearly spoken in an independent expenditure or electioneering communication transmitted by a method that does not include a visual image: "No candidate authorized this ad. Paid for by (name, city, state)." If the independent expenditure or electioneering communication is undertaken by a nonindividual other than a party organization, then the following statement must also be included: "Top Five Contributors" followed by a listing of the names of the five persons or entities making the largest contributions in excess of seven hundred dollars reportable under this chapter during the twelve-month period before the date of the advertisement. Abbreviations may be used to describe contributing entities if the full name of the entity has been clearly spoken previously during the broadcast advertisement.

(6) Political yard signs are exempt from the requirement of subsections (1) and (2) of this section that the name and address of the sponsor of political advertising be listed on the advertising. In addition, the public disclosure commission shall, by rule, exempt from the identification requirements of subsections (1) and (2) of this section forms of political advertising such as campaign buttons, balloons, pens, pencils, sky-writing, inscriptions, and other forms of advertising where identification is impractical.

(7) For the purposes of this section, "yard sign" means any outdoor sign with dimensions no greater than eight feet by four feet.

[2005 c 445 § 9; 1995 c 397 § 19; 1993 c 2 § 22 (Initiative Measure No. 134, approved November 3, 1992); 1984 c 216 § 1.]

(Emphasis added.)

2008 - DECLARED CANDIDATES

State Executive	39
State Legislative	
Senate	55
State Rep	218
Judicial	
Supreme Court	6
Appeals Court	9
Superior Court	224
District Court	1
Local Offices	272
TOTAL	**824**

OFFICE BREAKDOWN

Non-Partisan Offices	**323**
Partisan Offices	**501**

PARTY BREAKDOWN

Major Party Candidates:	
Democratic Party	207
Republican Party	244
Minor Party Candidates:	
Constitution Party	3
Green Party	3
Libertarian Party	1
Progressive Party	1
Independent Candidates	13
No Party Preference	20
Other Party Preference	9
	501

OTHER PARTY PREFERENCES SELECTED ON DECLARATIONS

Reform Party	1	1 - Governor Candidate
True Democratic Party	1	1 - Senate Candidate
Party of Commons	1	1 - Secretary of State Candidate
America's Third Party	1	1 - Senate Candidate
Cut Taxes G.O.P.	2	2 - St Rep Candidates
Executive Excellence Party	1	1 - Pierce Co Exec Candidate
SalmonYoga Party	1	1 - Senate Candidate
Progressive Dem Party	1	1 - St Rep Candidate
	9	

Current as of 6/17/2008

MINOR PARTY CANDIDATES

Constitution Party		
Glenn Freeman	Mini	St Auditor
Marilyn Montgomery	No C1	Secretary of State
Arlene Oeck	No C1	Lt Governor
Green Party		
E Duff Badgley	Mini	Governor
Howard Pellett	Mini	State Representative
Christopher Winter	No C1	State Representative
Libertarian Party		
Ruth Bennett	No C1	State Representative
Progressive Party		
Laurence Pratt	Mini	State Representative

OTHER PARTY CANDIDATES

Reform Party		
William Baker	No C1	Governor
True Democratic Party		
Hue Beattie	Full	State Senate
Party of Commons		
Clifford Greene	Mini	Secretary of State
America's Third Party		
Sarah Hart	Full	State Senate
Cut Taxes G.O.P.		
Keith Ljunghammer	No C1	State Representative
David Morris	No C1	State Representative
Executive Excellence Party		
Michael Lonergan	Full	Pierce County Executive
SalmonYoga Party		
Timothy Stoddard	No C1	State Senate
Progressive Dem Party		
Brendan Williams	Full	State Representative

Current as of 6/17/2008

Washington State Senate

Senator Darlene Fairley
32nd Legislative District

Olympia Address:
PO Box 40432
Olympia, WA 98504-0432
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Local Message Phone: (206) 368-4636

June 12, 2008

Bill Brumsickle
Chair, Public Disclosure Commission
711 Capitol Way South, Suite 210
P.O. Box 40908
Olympia WA 98504-0908

Dear Mr. Brumsickle:

As chair of the Government Operations and Elections Committee of the Washington State Senate, I am writing to state my position on two issues pending before you. Those issues are the proposals to suspend enforcement of the statutory requirement that candidate advertising contain the candidate's expressed party preference and the statutory prohibition against falsely claiming an endorsement or being an incumbent.

I strongly urge the Commission to reject both proposals.

Party preference disclosure. For over twenty years, candidates have been required to state their party affiliation on almost all advertising. With the adoption of the Top Two Primary system in Initiative 872, a candidate stating a party preference is still required by statute to place that preference on advertising, as are any interest groups. Please note that RCW 42.17.510 explicitly references the candidate's expressed preference:

> *For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, that party or independent designation shall be clearly identified in electioneering communications, independent expenditures, or political advertising.*

The "party or independent preference" language was added to the statute in 2005, after passage of Initiative 872 but before it was declared unconstitutional. Contained in ESSB 5034, the language was adopted with the Legislature's complete understanding that it would apply to whatever "party preference" a candidate expressed.

It is important to note that the language giving the Commission such concern was not drafted by the Legislature: the bill, sponsored by Senator Kastama, was agency request legislation. The original bill contained the same language. The agency requesting the bill was the Public Disclosure Commission.

I also understand that your concern is based upon a series of assumptions: that candidates will prefer non-traditional, even frivolous, parties; that those candidates will spend to advertise without disclosing their preferences; and their opponents will file complaints before the Commission. Although I can concede for purposes of discussion that you may be right about the first assumption, I seriously doubt whether such candidates, particularly serious candidates, would advertise without loudly trumpeting the one thing that might make them stand out from their opponents: the unique party preference that the Top Two system allows. Frankly, I would be stunned if a candidate preferring "A Good Budweiser" party, mentioned in your materials and May meeting, would spend even a single dollar advertising that preference.

I also was pleased to note, based on the Secretary of State's web site, that virtually all of the "party preferences" made reference to actual political parties, both major parties and minor ones. I would expect that candidates who claimed a preference for a familiar party together with a description, such as the "Cut Taxes G.O.P. Party", have done so with the desire to distinguish themselves from other candidates, even those of the same general party. It should prove to be no hardship to list that preference on advertising; in fact, it would be consistent with the candidate's message to list it.

False statements by candidates. As your staff has described, the statute prohibiting false statements by candidates has been partially invalidated by the Supreme Court in the *Rickert* case. However, two of the remaining prohibitions – falsely claiming an endorsement and falsely claiming to be an incumbent – are not affected.

I certainly appreciate the uncertainty facing the Commission, especially as the Legislature was unable to fully address changes to the statute in the 2008 session. I do not expect the Commission to take action involving false statements made by a candidate that fall within the purview of the Court's decision. However, as the remaining sections of the statute are not directly impacted by the court decision, I do not believe the Commission should undertake the unusual step of deciding not to enforce it.

I understand that there are circumstances in which the Legislature has authorized the PDC to choose to not enforce a statutory requirement. For example, RCW 42.17.370 (8) allows the PDC to relieve certain candidates of their obligations to comply with the laws regarding election campaigns; subsection (10) authorizes the PDC to suspend reporting requirements, but only in a particular case following a hearing in which it was determined that a "manifestly unreasonable hardship" would result. Neither of these limited circumstances applies to the decisions before the commission now.

I am not aware of any provisions of Chapter 42.17 RCW that authorize the PDC to simply ignore statutes it is otherwise charged with enforcing. I reviewed with interest the following statement: "The commission shall...investigate and report apparent violations of this chapter [and] enforce this chapter according to the powers granted it by

Richard L. Pope, Jr.
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May 27, 2008

FAX TO 360-753-1112, E-MAIL, AND MAIL **TOTAL FAX PAGES: 4**

Vicki Rippie
Executive Director
Public Disclosure Commission
711 Capitol Way, Room 206
Post Office Box 40908
Olympia, Washington 98504-0908

Re: PDC Proposal to Suspend Enforcement of RCW 42.17.510(1)

Dear Ms. Rippie:

It would be a major mistake for the Public Disclosure Commission to suspend the enforcement of the political party identification rules in political advertising that are set forth in RCW 42.17.510(1) and WAC 390-18-020. These requirements to identify party preference in advertising were not superseded in any way by Initiative 872. In fact, the 2005 Legislature specifically amended RCW 42.17.510(1) during the 2005 Regular Session (before the now-overturned federal district court ruling striking down I-872) for the purpose of making RCW 42.17.510(1) conform to the newly adopted I-872 provisions regarding party preference.

Here is the relevant portion of Laws 2005, Chapter 445, Section 9 relating to this:

> **Sec. 9.** RCW 42.17.510 and 1995 c 397 s 19 are each amended to read as follows:
> (1) All written political advertising, whether relating to candidates or ballot propositions, shall include the sponsor's name and address. All radio and television political advertising, whether relating to candidates or ballot propositions, shall include the sponsor's name. The use of an assumed name for the sponsor of electioneering communications, independent expenditures, or political advertising shall be unlawful. ((~~The party with which a candidate files~~)) For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, that party or independent designation shall be clearly identified in electioneering communications, independent expenditures, or political advertising ((~~for partisan office~~)).

Prior amendment in 2005, the relevant part of RCW 42.17.510(1) read: **The party with which a candidate files shall be clearly identified in political advertising for partisan office.**

After amendment in 2005, the relevant part of RCW 42.17.510(1) now reads: **For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, that party or independent designation shall be clearly identified in electioneering communications, independent expenditures, or political advertising.**

So the 2005 Legislature clearly required that political party preference be identified in advertising, and took into account the changes that were made by the recently adopted I-872.

Your analysis of the legislative history of RCW 42.17.510(1) in your May 14, 2008 memo to the members of the Public Disclosure Commission is deeply flawed, since you totally failed to take the 2005 amendments into account, which were made after the adoption of I-872 and for the purpose of implementing the political party preference provisions of that initiative.

So I would urge the Public Disclosure Commission to keep the provisions of WAC 390-18-020 in effect, and for the PDC and its staff to actually enforce RCW 42.17.510(1).

I would note that the PDC has had a history of not actually enforcing RCW 42.17.510(1) when complaints were filed, even under the prior party primary and nomination system.

For example, when I was running for King County Council last year, the King County Republican Central Committee spent a little over $27,000.00 in political advertising as an in-kind contribution to my opponent, Jane Hague. This political advertising (most of which was mail pieces attacking my own candidacy) failed to include my political party designation.

I filed complaints with the PDC and Attorney General on October 4, 2007 and October 5, 2007. Some months later, the PDC basically dismissed my complaint, with only a warning letter to the KCRCC that they had violated the law and that they needed to include party designation in future political advertising. All of this was in spite of the fact that the KCRCC had agreed to a settlement with the PDC for prior violations back in May 2007, in which they were fined a total of $40,000.00, with $17,500.00 of this fine suspended on condition that the KCRCC not violate any PDC laws for four years through December 31, 2010. So not only was no enforcement action taken with respect to the KCRCC illegally spending $27,000.00 on non-party identified advertising, no action was taken with respect to the previously suspended fine either.

Needless to say, I am concerned that the real reason you are proposing to have the PDC suspend enforcement of RCW 42.17.510(1) is because you and your staff don't personally feel that the party identification requirement of the law is a very important enforcement priority.

Thank you for your careful attention in this matter.

Very truly yours,

Richard L. Pope, Jr.

Attachment (Excerpt from Laws 2005, Chapter 445, Section 9)

CERTIFICATION OF ENROLLMENT

ENGROSSED SUBSTITUTE SENATE BILL 5034

Chapter 445, Laws of 2005

59th Legislature
2005 Regular Session

CAMPAIGN FUNDING

EFFECTIVE DATE: 1/1/06 - Except sections 6 and 12, which become effective 7/1/05.

Passed by the Senate April 20, 2005
YEAS 26 NAYS 20

BRAD OWEN

President of the Senate

Passed by the House April 13, 2005
YEAS 56 NAYS 40

FRANK CHOPP

Speaker of the House of Representatives

Approved May 13, 2005.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE SENATE BILL 5034** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

Secretary

FILED

May 13, 2005 - 2:42 p.m.

Secretary of State
State of Washington

Sec. 9. RCW 42.17.510 and 1995 c 397 s 19 are each amended to read as follows:

(1) All written political advertising, whether relating to candidates or ballot propositions, shall include the sponsor's name and address. All radio and television political advertising, whether relating to candidates or ballot propositions, shall include the sponsor's name. The use of an assumed name for the sponsor of electioneering communications, independent expenditures, or political advertising shall be unlawful. ((~~The party with which a candidate files~~)) For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, that party or independent designation shall be clearly identified in electioneering communications, independent expenditures, or political advertising ((~~for partisan office~~)).

(2) In addition to the materials required by subsection (1) of this section, except as specifically addressed in subsections (4) and (5) of this section, all political advertising undertaken as an independent expenditure by a person or entity other than a party organization, and all electioneering communications, must include the following statement ((~~on~~)) as part of the communication "NOTICE TO VOTERS (Required by law): This advertisement is not authorized or approved by any candidate. It is paid for by (name, address, city, state)." If the advertisement undertaken as an independent expenditure or electioneering communication is undertaken by a nonindividual other than a party organization, then the following notation must also be included: "Top Five Contributors," followed by a listing of the names of the five persons or entities making the largest contributions in excess of seven hundred dollars reportable under this chapter during the twelve-month period before the date of the advertisement or communication.

(3) The statements and listings of contributors required by subsections (1) and (2) of this section shall:

(a) Appear on the first page or fold of the written advertisement or communication in at least ten-point type, or in type at least ten percent of the largest size type used in a written advertisement or communication directed at more than one voter, such as a billboard or poster, whichever is larger;

(b) Not be subject to the half-tone or screening process; and

CERTIFICATE OF SERVICE

I hereby certify that, I served copies of the foregoing Supplemental Brief and Addendum on counsel of record for all parties on August 1, 2008, by placing same in the hands of Federal Express for delivery on Monday, August 4, 2008:

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United States Court of Appeals
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San Francisco, California 94103-1518

Dated: August 1, 2008.

Alex Wagner